STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF	)	
	)	
MARCO A. OROZCO,	)	
	)	Charge No. 1992CA0529
Complainant,	)	ALS No. 7178
	)	EEOC No. 21B913245
and	)	
	)	
DYCAST, INCORPORATED,	)	
	)	
	)	
Respondent.	)	

ORDER AND DECISION

May 28, 2004

The Commission by a panel of three:
Commissioners Dolly Hallstrom, Munir Muhammad, and Arabel Alva Rosales, presiding.

This matter comes before the Commission on review of the January 23, 2003 Recommended Order and Decision issued by Administrative Law Judge Nelson Perez and exceptions filed thereto.

For Complainant: Elaine K.B. Siegal, Leonard Saphire-Bernstein and Kaci Holguin
Siegal & Saphire-Bernstein, L.L.C.

For Respondent: Peter R. Bulmer and James Botana
Jackson Lewis LLP

For the Commission: James E. Snyder, General Counsel,
Matthew Z. Hammoudeh, Asst. General Counsel.

On review of Judge Nelson Perez's recommendations, the public hearing record, the exceptions filed by the Complainant, the response filed by the Respondent and for the reasons set forth herein, the Recommended Order and Decision is reversed. We find the manifest weight of the evidence to support the finding that the Respondent unlawfully discriminated against the Complainant on the basis of his national origin and ancestry. This matter is remanded to the Chief Administrative Law Judge for further proceedings consistent with this order.

I. Nature of the Case.

The Complainant, Marco Orozco, was employed with Dycast Incorporated from October 28, 1971 to April 19, 1991. The Complainant's national origin is Colombian and his ancestry is Hispanic. In 1976, the Complainant was promoted to the position of Metals Supervisor and remained in that position until April 19, 1991 when his position was eliminated and as a result, he was laid-off and not recalled.

There was a leveraged buyout of the Respondent Dycast by New York-based investors on November 21, 1988. As a result of the new ownership, a new management team was put into place, which consisted of Robert Zach as President (Zack), Charles Davidson as Vice President of Manufacturing (Davidson), Norman Kocol as Vice President of Finance (Kocol), Ralph Graber as Vice President of Engineering (Graber), and Fabio Herrera as Human Resources Manager (Herrera). With the exception of Herrera, the entire management team was Caucasian. (Tr. p.414, Kocol, 10/3/01.)

From 1989 to 1991, the Respondent experienced financial difficulties that consisted of loss of financing, the loss of contracts worth over two million dollars, as well as the loss of invested capital. In April of 1991, the Respondent continued to experience financial difficulties. As a result, the Respondent implemented a Reduction In Force (RIF), a series of layoffs of hourly and salaried employees. Each of the Respondent's four departments was required to eliminate one salaried employee. In addition, the Respondent eliminated one member of its' management team.

In April of 1991, the Complainant's Metals Supervisor position was eliminated upon the vote of a five-member committee. As a result of the job elimination, the Complainant was laid-off and was not called back. The Complainant charged that Dycast discriminated against him based on his age, national origin (Columbian) and ancestry (Hispanic).

II. Proceedings.

Administrative Law Judge Nelson Perez heard the case during a public hearing on October 1-4, November 14-18 and December 1, 2001. At the conclusion of the Complainant's case in chief, Judge Perez entered a summary decision dismissing the Complainant's age discrimination claim. The case proceeded on the Complainant's national origin and ancestry discrimination claims.

Judge Perez entered a Recommended Order and Decision on January 23, 2003 recommending that the Complaint and underlying Charges of Discrimination against the Respondent be dismissed with prejudice.

The Complainant takes exception to the recommendation of dismissal and argues that the manifest weight of the evidence supports the finding that (A) the Respondent discriminated against him because it did not allow him to bump less senior employees or

did not recall him; and (B) the Respondent discriminated against him based on comments made by the Respondent's employees. The Complainant asks the Commission to set aside the Recommended Order and Decision of the Administrative Law Judge and enter a decision for the Complainant.

The Respondent argues that (A) the Judge found Dycast treated all salaried employees whose positions were eliminated by the April 1991 RIF the same regardless of their ancestry or national origin; none of these salaried employees were allowed to bump less senior employees or recalled; and (B) the Judge found that either the comments in question were not made, or that if they were made, they were not sufficient to prove discrimination by a preponderance of the evidence. The Respondent asks the Commission to reject the Complainant's exceptions and sustain the Judge's Recommended Order and Decision.

III. Findings.

In reviewing an Administrative Law Judges' findings of fact, the Commission will adopt the Judge's findings unless they are contrary to the manifest weight of the evidence presented at the hearing, 775 ILCS 5/8A-103(E)(2). The Commission reviews a question of law *de novo* and is empowered to modify, reverse, or sustain the Judge's recommendations, in whole or in part, 775 ILCS 5/8A-103(E).

National Origin and Ancestry Discrimination

The Human Rights Act prohibits discrimination in employment because of a person's national origin and ancestry and forbids covered employers to discriminate based on national origin and ancestry "with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment," 775 ILCS 5/2-102(A) (1996). A complainant may prove employment discrimination under the Human Rights Act in one of two ways: he may attempt to meet his burden by presenting direct evidence that ancestry or national origin were determining factors in the employment decision, or he may use the indirect method of proof set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Judge Perez found that there was insufficient direct evidence to prove unlawful discrimination by the Respondent. We agree.

Under the indirect method of proof, Judge Perez found that the Complainant established a prima facie case of unlawful discrimination so as to require the Respondent to explain its' actions. Judge Perez also found that the Respondent articulated a neutral, non-discriminatory explanation for the adverse employment action. After review of the record, we agree with those findings.

Judge Perez further found that the Respondent's articulated reasons for its' actions were not a pretext for unlawful discrimination. We disagree with this finding as it is against the manifest weight of the evidence.

Whether an employer's articulated explanation for its employment decision is pretextual is a question of fact, and the question before the Commission is whether Judge Perez's finding of no pretext is contrary to the manifest weight of the evidence. A Complainant may establish pretext by showing either that (1) the employer's explanations are not worthy of belief; (2) the proffered explanation had no basis in fact; (3) the proffered explanation did not actually motivate the decision; or (4) the proffered explanation was insufficient to motivate the decision, Sola *v. Illinois Human Rights Comm'n,* 316 Ill.App.3d 528 (1st Dist. 2000).

The Complainant argues that regardless of the Respondent's financial situation and subsequent elimination of his position, he should have been recalled or allowed to "bump" a less senior employee. The Respondent argues that the Complainant was not entitled to bumping rights because he was a salaried employee and was not recalled because he was not qualified for any other position.

The Complainant worked for the Respondent for over twenty years and the Respondent, prior to 1998, praised the Complainant in performance evaluations. (Tr. p. 55-59, Orozco, 10/1/01.) The Complainant was responsible for supervising three Metals Shop employees; part of the Complainant's responsibilities also entailed supervising the janitors, working in the stock room and other medial duties such as disposing of inventory, shipping and loading, and driving a truck when necessary. Given the Complainant's twenty years of experience, he was capable of performing a multitude of lower-level jobs at Dycast. (Tr. p. 958, lines 6-8, Orozco, 11/13/01.) The Complainant was never offered another position within the company. (Tr. p. 321, lines 6-13, Orozco, 10/2/01.)

The Respondent has a Seniority Policy (Policy) that Judge Perez found did not apply to salaried employees. This finding is against the manifest weight of the evidence where the Policy does not contain any such exceptions; taken on its plain meaning, the Policy provides seniority rights for all "senior employees," with no exceptions for salaried personnel. (Comp. Ex. 11, May 9, 1980 "Layoff/Recall Procedure".) (Tr.p. 319-321, Herrera, 10/2/01.).

Kocol, Vice President of Finance for the Respondent, testified that it was not the practice of the Respondent to only offer salaried people bumping rights. (Tr. p. 447, Kocol, 10/3/01). Herrera, the Respondent's Human Resource Manager for seven years, testified that the Policy provided seniority rights for all "senior employees," without exception. Herrera further testified that at a prior meeting he warned Dycast management that they were violating the Complainant's rights under the Policy and Kocol just said, "Who cares?" Herrera further testified that he confronted Kocol about the Policy in conjunction with the Complainant's "layoff" and Kocol made no reference to the policy's alleged inapplicability to salaried employees. (Tr.p. 338-339, Herrera, 10/2/01.) Herrera

testified that his understanding of personnel practices was based on his lengthy experience in the human resource function at the Respondent where Kocol, in contrast, assumed personnel duties only after Herrera's termination in 1991. Also, in prior testimony before the Industrial Commission, Kocol was asked under oath, about the Respondent's Policy, specifically with respect to the Complainant; Kocol made no mention of any exclusion regarding supervisors or salaried employees. (Compl. Ex. No. 18, Kocol Testimony before the Industrial Commission on December 6, 1991 at 50.)

In accordance with Dycast policy, the Complainant was not only entitled to be considered for "bumping" a less senior employee for a job he was qualified to perform, but he was also entitled to be considered for positions that subsequently opened. (Comp. Ex. 11, May 9, 1980 "Layoff/Recall Procedure".)

The Respondent did not consider the Complainant for "bumping" or any job openings after his discharge. (Tr. p. 477-478, Kocol, 10/3/01). The Complainant has over twenty years of experience working for the Respondent and testified that he was capable of performing a multitude of lower-level jobs at Dycast. (Tr. P. 958, Orozco, 11/13/01). Herrera (a Columbian) was terminated without being considered for "bumping" or recall rights. Bernie Soya's (Soya) position as Engineer for the Respondent was eliminated yet Soya, a Caucasian, was not laid off; on the contrary, even though he did not apply, he received a major promotion, to the position of Manufacturing Vice President and was furthermore promoted over Herrera, a Columbian, who did apply for the job. (Tr., p. 581, Kocol, 10/2/01.)

Further evidence that the Respondent's explanation for the adverse employment action at issue is not worthy of belief is the fact that the Respondent reclassified the Complainant as a salaried employee effective January 1, 1991, more than twenty years after he began employment with the Respondent and only four months prior to his "layoff" when this claim that the policy did not apply was made. (Tr. p465, Kocol, 10/03/02.) We find that the seniority policy did apply to the Complainant and that the claim by the Respondent that the policy did not apply to the Complainant, a salaried employee, is not worthy of belief and therefore a pretext for discrimination.

Statements indicative of bias that were made by management are further evidence that the proffered explanation for terminating the Complainant without recall or bumping rights was a pretext for unlawful discrimination. These derogatory statements are evidence that a prohibited consideration was a factor in the adverse employment action. President Robert Zack told Neff Herrera that the Complainant and Fabio Herrera were not offered lower-level positions because "Hispanics have pride, are too macho and don't want to be transferred or offered something else." (Orozco Ex. 17, Resp. 6-9.) Moreover, the Complainant and Human Resources Manager Fabio Herrera testified that Davidson continuously referred to the Hispanic workforce as "stupid Spanish people," "fucking Spanish people," and "fucking people." (Tr.p. 66-67, 71, Orozco, 10/1/01; p. 281, Herrera, 10/2/1; p. 380, Herrera, 10/3/01). The Complainant also testified that Davidson yelled at him asking, "do you understand English?" A memo from Davidson to Zack

corroborated this remark where he wrote, "I asked him if I spoke a foreign language that he was unable to understand…" (Oroz. Ex. 9.)

Judge Perez found that Kocol used the term "Columbian mafia" prior to a management meeting during the time that downsizing was under discussion. Herrera, who overheard the remark, testified that Kocol stated, "We're waiting for the Columbian Mafia to start the meeting." Kocol testified that to him, "mafia" meant "a control group." Kocol admits making this comment. (Tr. p. 484-85, Kocol, 10/3/01). Additionally, between January and April, 1991, Luisa Sochacz heard Ralph Graber, Davidson, Soya, and Kocol, use the epithet "Columbian Mafia" a number of times. (Tr. P. 655-56, 57, 58, 59, Sochacz, 10/4/01).

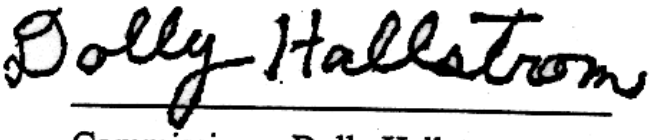
We therefore find that the Respondent's articulated explanation for discharging the Complainant without giving him the opportunity to be recalled or to bump another less senior employee was a pretext for discrimination where the manifest weight of the evidence supports the conclusion that the Respondent unlawfully discriminated against the Complainant on the basis of his national origin and ancestry.

IT IS HEREBY ORDERED THAT:

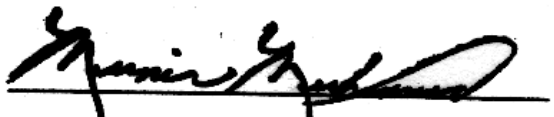
1. The Recommended Order and Decision issued in this matter is not adopted; and
2. This matter is remanded to the Chief Administrative Law Judge for proceedings consistent with this Order.

STATE OF ILLINOIS
Entered this 28th day of May 2004.

HUMAN RIGHTS COMMISSION



Commissioner Dolly Hallstrom



Commissioner Munir Muhammad

Commissioner Arabel Alva Rosales

(Panel D, Commissioners Hallstrom, Muhammad and Rosales)